IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1897 of 2002
with
CIVIL APPLICATION No 6514 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

NAGINBHAI DAHYABHAI PATEL

Versus

MAHENDRABHAI RAMBHAI

Appearance:

1. First Appeal No. 1897 of 2002

MR HM PARIKH for Petitioner No. 1

MR ARUNKUMAR M PATEL for Respondent No. 1-2

MR NIRAV C THAKKAR for Respondent No. 1,3-2

..... for Respondent No. 4-6

CORAM : MR.JUSTICE K.M.MEHTA

Date of decision: /10/2002

JUDGEMENT

1. Naginbhai Dahyabhai Patel, appellant herein original opponent No.3 obstructionist has filed this appeal under Order 21 Rule 103 read with section 96 of the Code of Civil Procedure against the judgment and order dated 31st May, 2002, passed by the learned 4th Joint Civil Judge (S.D.), Nadiad in Civil Suit No.61/83. The learned Judge by his impugned judgment was pleased to allow the application filed by M/s.Bhaidas Karsandas and Company and others - original applicants and respondents herein and dismissed the objection of the obstruction application in this behalf.

2. The facts giving rise to this appeal are as under:-

2.1 There is a property bearing Panchayat No.M/1/297 situated at Mehalav Village, Hathibhai Khadki, (hereinafter referred to as `the suit property'). M/s. Bhaidas Karsandas & Company respondent No.4 herein filed a Civil Suit No.804 of 1976 before the High Court of Judicature at Bombay. The High Court issued order of attachment of property in question against M/s.Manharlal Ashabhai and Manharbhai Ashabhai - opponents No.5 and 6. The Court passed decree on 5.7.1976 in their favour. The said decree was transferred to the Court of Civil Judge (S.D.) at Nadiad for execution.

2.1(A) A Special Execution Petition No.57 of 1977 was filed by the opponent No.4 against opponents No.5 and 6 wherein the suit property being House No.297/1 situated in the village Mehalav was attached. On 11.7.1978 the opponents No.5 and 6 filed reply at Exh.20 wherein they never stated that there was tenant in the suit property. On 9.1.1981 the respondents No.5 and 6 judgment debtors filed Exh.50 reply wherein contention was raised regarding the property being ancestral and therefore not liable to be auctioned since share of other family members was also present. Still fact that tenant was there on the property not mentioned.

2.2 On 16.6.1981 court bailiff carried out panchnama of the premises in question. At that time no tenant was found on 24.6.81. The property was attached pursuant to warrant and bailiff had come to sell the same by affixing notice at conspicuous places on the property and proclamation by shouting and even at that stage also no tenant was found and nobody objected to the same.

2.3 Manharbhai Ashabhai Patel - opponent No.5 judgment debtor filed an application Exh.59 on 6.2.1982 and prayed that he has complete authority to sell the

property and he may be permitted to sell it privately since it will fetch more price. Pursuant to that auction of the property was declared on 7.7.1982. After some adjournments and analyzing the bids received on 20.10.1982 auction was held and completed. Since no objections were received the auction was confirmed on 26.11.1982.

2.4 The auction purchaser had executed a Kabalakhat Exh.152 on 30.4.1983 in favour of M/s.Bhaidas Karsandas & Co. (respondent No.4). The respondent No.4 filed a Misc.Civil Application No.61/83 on 1.7.1983 under Order 21 Rule 95 for getting possession. In 1984 advocate on behalf of judgment debtor remained present and sought time to file reply and many adjournments were also sought. Pursuant to the aforesaid proceedings entry of sale in favour of judgment-creditor plaintiff made in office of Sub-Registrar, Petlad on 25.11.1984.

2.5 Naginbhai Dahyabhai Patel - appellant instituted a Civil Suit No.348 of 1987 and prayed for injunction against the dispossession which was passed therein. The judgment debtor thereafter filed Pursis Exh.26 on 5.10.87 withdrawing objections against reliefs claimed by judgment creditor and stated that he does not have objection if reliefs are granted.

2.6 On 13.10.1987 warrant for possession was issued. Thereafter appellant preferred application on 18.10.1987 Exh.29 against execution order passed in Civil Misc.Application No.61/83.

2.7 The present respondents No.1 to 3 purchased the property in question from judgment creditor on 21.12.1990 and made entry in favour of the respondents No.1 to 3 in the office of Sub-Registrar, Petlad. Thereafter respondents No.1 to 3 filed an application on 6.8.1992 prayed for to join them as party to the proceedings. The said action was not challenged. The respondents No.1 to 3 received a copy of Exh.29 on 10.2.1995. The respondents No.1 to 3 filed reply Exh.69 on 28.2.1995 as reply to Exh.29. Thereafter the court passed the order below Exh.29 on 10.3.1998.

2.8 Being aggrieved and dissatisfied with the said action, the present appellant filed Civil Revision Application No.526 of 1998 before this Court on 23rd March, 1998. The said revision application came up for hearing before this Court on 17th April, 1998, this Court (Coram: N.N.Mathur, J.) passed the following order:

"Heard the learned Advocates for the parties. It is not in dispute that the third party petitioner raised objection vide Exh.29. Mr.Yatin Soni, learned Advocate appearing for respondents No.3, 4 and 5 submits that the application Exh.69 was filed for possession, the said application may be permitted to be treated as application for removal of obstruction under Order 21 Rule 97 CPC. Permission granted. In view of this, the impugned order dated 10.3.1998 passed by the 4th Civil Judge (S.D.), Nadiad, is quashed and set aside. The learned Judge shall decide the Exh.69 considering the application for removal for obstruction under Order 21 Rule 97 CPC in accordance with law. This order is passed without prejudice to the rights and contentions of the petitioner-third party. The Executing Court shall expedite the proceedings. The parties before that Court assure that they will fully cooperate with the Court."

2.9 After the aforesaid order passed by this Court, the matter was again heard by the trial court. The trial Court considered all these aspects and came to the following conclusions:

(1) The applicants proved that they are entitled to possession of suit property from third party Naginbhai Dahyabhai Patel.

(2) The applicants also proved that in view of the order in Special Darkhast No.57/77 and Civil Appeal No.61/83 Exh.69 can be entertained.

(3) The applicants proved that the suit property has been sold by decree holder privately so Exh.69 can be entertained in this behalf.

(4) Naginbhai Dahyabhai Patel is able to prove that he has filed a suit before the Civil Judge (J.D.) at Petlad in Civil Suit No.348/87 contending that they are tenant in the suit property and in that suit the trial court has granted injunction till disposal of the suit.

(5) The obstructionist Naginbhai Dahyabhai Patel appellant herein failed to prove that they were tenant from the judgment debtor deceased Manharbhai Ashabhai from 11.4.1974 of annual rent of Rs.240/-.

(6) The third party Naginbhai Dahyabhai Patel failed to prove that the applicants are entitled to only symbolic possession.

(7) The obstructionist Naginbhai Dahyabhai Patel failed to prove that the application filed by the applicants is barred by period of limitation.

(8) The obstructionist failed to prove that the present application is not maintainable at law and the applicants are not entitled to the reliefs as prayed for in this behalf. The applicants are entitled to special costs in this behalf.

3. When the matter was heard before this Court, Mr.H.M.Parikh, learned advocate for the appellant submitted that originally judgment creditor has a right to file an application under Order 21 Rule 97 within 30 days from the date of objection but the judgment creditor has not filed any objection within the period of limitation as prescribed under Article 129 of the Limitation Act.

3.1 Learned advocate for the appellant further submitted that on 21.12.1990 the judgment creditor sold the property in favour of respondents no.1, 2 and 3 and on 6.8.1992 the respondents No.1 to 3 filed an application for being joined as a party. Thereafter the respondents No.1 to 3 applied for possession of the property which was granted by the learned trial Judge against which the present appellant preferred Civil Revision Application No.526 of 1998. He further submitted that the proceedings under Order 21 Rule 97 are independent proceedings and they are required to be tried as a suit and hence the said proceedings are required to be numbered as Misc. Civil Application and the same required to be tried as if it is a suit.

3.2 He further submitted that the learned trial Judge ought to have seen that under Order 21 Rule 97 either the decree holder or the auction purchaser has right to move an application for removal of the obstruction. So far as respondents No. 1 to 3 are concerned, they are neither the decree holder nor the auction purchaser. It was submitted that they were knowing that the property is under litigation and an injunction has been issued against the predecessor in title i.e. the judgment creditor and his right to move an application under Order 21 Rule 97 was already barred by limitation as the

objections were moved on 18.10.1987 while the properties were purchased on 21.12.1990. He further submitted that thus even after the expiry of the period of more than three years, the respondents No.1 to 3 have purchased the property. As the respondents No.1 to 3 are not coming within the definition of Order 21 Rule 97, they cannot file an application in the court and the application Exh.69 filed by them is not maintainable at law. Even otherwise the respondents No.1 to 3 cannot get a better title than what their predecessor had. Right to file an application by their predecessor has already expired and hence the respondents No. 1 to 3 cannot file an application in the year 1995 on the ground that they have been served with the copy on 10.2.1995. Article 129 of the Limitation Act provides the period of limitation for 30 days from the date of the resistance or obstruction. Resistance or obstructions were known to the decree holder and hence no question of service of the application or knowledge arises as the person, who had gone for execution of a decree for immovable property has a knowledge of resistance as the bailiff is returning without handing over the possession and makes a report to the court.

3.3 In support of the aforesaid contention, learned advocate for the appellant has relied upon the judgment of this Court in the case of Maneklal Nathalal Jingar Vs. Ochhavlal Chhaganlal and another reported in 10 GLR 654 wherein Division Bench of this Court had an occasion to consider the provisions of Order 21 Rule 97. In that case the question was about the fresh period of limitation and this Court has said that if in an earlier possession warrant, the decree holder has been obstructed, even the decree holder can file fresh application for possession warrant and again if he is obstructed in that case fresh cause of action would arise. As in this case the application is not filed within 30 days, the present proceeding is required to be dismissed on the ground of limitation.

3.4 Learned advocate for the appellant further submitted that the Civil Court would not have jurisdiction in view of the provisions of Sec.28 of the Bombay Rent Act. In the present case the issue which has been raised is pertaining to the tenancy of the premises and before the initiation of the proceedings by the respondents No.1 to 3, the appellant has already filed Civil Suit No.348/87 and obtained an injunction against the predecessor in title of the respondents No.1 to 3. Section 28 of the Bombay Rent Act provides that any dispute between the landlord and tenant is to be decided

by the Rent Court and the jurisdiction of other courts has been barred.

4. Mr.Nirav Thakkar, learned advocate appearing on behalf of the respondents has contended as follows:

4.1 As regards limitation, Article 129 of the Limitation Act provides description of application, period of limitation and time from which period begins to run. He submitted that Article 129 of the Act would not be attracted in the present case for dismissing the application of the respondents No.1 to 3 under Order 21 Rule 97 because of the following facts:

(1) Application Exh.29 preferred by the appellant was served to the respondents Nos.1 to 3 only on 10.2.1995 and the reply Exh.69 (which was later ordered to be treated as application under Order 21 Rule 97 by the Hon'ble High Court in Civil Revision Application No.526/98) was filed on 28.2.1995 i.e. within a period of 30 days.

(2) When there is an obstruction to execution of a decree, every obstruction gives rise to a fresh cause of auction for preferring application under Order 21 Rule 97.

4.2 For that purpose reliance is placed on two decisions namely (1) Maneklal Nathalal Jingar Vs. Ochhavlal Chhaganlal and another reported in 10 GLR 654 particularly para 8 on page 657 and para 9 on page 658 which reads as under:

"para.8 The other view, which is adopted by several of the other High Courts in India is to the effect that every resistance or obstruction givens rise to a fresh period of limitation which begins from the date of the particular resistance or obstruction complained of. The main reasons on which these High Courts have based the above view can be summarised as follows :-

(1) Making of an application under Order 21, Rule 97 complaining about the resistance or obstruction to delivery of possession is a permissive and enabling provision for the decree-holder, he is not bound to make such an application. No penalty of any nature can be imposed upon the litigant if he fails to avail himself of a merely permissive or enabling

remedy.

(2) The different rules of Order 21, deal with procedure in execution of a decree. The issuance of a warrant for possession is a step in the entire procedure for helping the decree-holder to obtain the fruits of his decree. The decree-holder is entitled to say to the Court at any stage of the procedure that he would not like to have the help of the Court any more. Merely because he does not ask the Court to help him any further, it would not deprive him of his right to go to the Court again at any time during which his decree is alive and enforceable.

(3) When a person resists or obstructs delivery of possession, he merely intimates to the decree-holder that he would not allow him to take possession. It is open to the decree-holder not to join issue with him at the time and to allow the warrant to lapse. This conduct of the decree-holder may be the result of (a) his belief that the claim of resister is correct, or (b) he may not, for same reason, be prepared to spend time and money at that particular time; or (c) he may feel that the claim of the resister or obstructor is of a temporary duration; or (d) he may think it advisable to deal with the resister or obstructor out of Court. Since the making of the application under Order 21, Rule 97 is permissive and not mandatory, the resistance or the obstruction that was occasioned at the first time comes to an end with the abandonment by the decree-holder of his right to enforce the warrant for possession by making an application for the removal of resistance or obstruction. That obstruction cannot then be said to be continued when a fresh obstruction is made to delivery of possession under a fresh warrant for possession.

(4) Since the law allows the decree-holder to abandon, at his sweet will, the enforcement of warrant for possession and to apply for a fresh warrant for possession at any time so long as the decree for possession remains alive and enforceable, it is implicit in this right of the decree-holder that he can make an application under Order 21, Rule 97 every time he is obstructed or resisted.

(5) Article 167 of the Limitation Act of 1908

(corresponding to Article 129 of the Limitation Act of 1963) relates to a complaint of resistance or obstruction to delivery of possession of immovable property decreed and the period of limitation begins to run from the date of resistance or obstruction. The resistance or the obstruction mentioned in the third column of Article 167 refers to the resistance or obstruction of which the complaint is made in the application under Order 21, Rule 97. If, therefore, the complaint is made regarding second obstruction, time will begin to run from the date of the second obstruction and not from the date of the first obstruction.

"para.9 These are the different reasons which have induced the High Courts of Calcutta, Madras, Allahabad, Patna, Travancore-Cochin and Sind to accept the view that even if the first obstruction was made by the same person in the same character as the second obstruction, in respect of the application under Order 21, Rule 97 complaining of the second obstruction, the time would begin to run from the date of the second obstruction and not from the date of the first obstruction. Some of the various cases in which this view has been expressed by the High Courts are : Narain v. Hazari Lal 18 Allahabad 233; Official Trustee v. Monmothonath AIR 1953 Calcutta 499; P.N.Pathak Sharma v. Renuka Debi AIR Calcutta 613; Narayanswami v. Veerappa AIR 1949 Madras 753; Raghunandan v. Ramcharan AIR 1919 Patna 426; S.Gnanappu v. T.Pillai AIR 1957 Travancore Cochin 287 and Kotumal v. Gur Ashram AIR 1947 Sind 118. We are in agreement with the conclusion and the reasoning expressed in these decisions and, with respect, we do not think that the observations in AIR 1933 Bombay 457 (supra) lay down the correct law."

4.2(A) He has relied on another decision in the case of Narayan and another Vs. Smt.Kalan Bai reported in AIR 1986 Raj.52.

4.3 Learned advocate for the respondents further submitted that application Exh.29 was preferred by the appellant on 18.10.1987 and prayed for injunction against dispossession which was granted. Therefore at the instance of the appellant the decree holder and respondents No.1 to 3 were obstructed from execution of decree till the date the order of injunction passed below

Exh.29 continued to operate. Thus, so long as the order below Exh.29 continued to remain in force, the decree holder and the respondents No. 1 to 3 were obstructed every day giving rise to a fresh cause of action, therefore also Article 129 would not be attracted.

4.4 He further submitted that the objection that the respondents No. 1 to 3 would not get better title that the person from whom they purchased the property (i.e. auction-purchaser) is also answered inasmuch as the obstruction is continuing day to day and therefore even the auction-purchaser had right to prefer application under Order 21 Rule 97 on every fresh obstruction.

4.5 As regards jurisdiction, learned advocate for the respondents submitted that the objection is raised to the jurisdiction of the Civil Court to the effect that it could not have decided the tenancy rights of the appellant as is done in the present case and it ought to have been decided only by the rent court. This objection would also not survive in view of the following submissions:

(1) The Civil Court has concluded that the appellant had forged a stamp paper of 1974 and had misused the same to fraudulently get advantage of claim of tenancy, which is within the jurisdiction of the Civil Court.

(2) When a contention is raised by the appellant, the Civil Court was required to answer the same or else the order would be challenged only on the ground that the Civil Court has not decided the issue though specifically raised.

(3) In any event, now even the Rent Court has arrived at a finding that the appellant was never the tenant of the judgment debtor. Appeal over the said judgment of the Rent Court is preferred, but no stay is granted. Therefore, also this objection would not now survive.

4.6 He has also relied upon the judgment of the Hon'ble Apex Court in the case of Kazi Akeel Ahmed Vs. Ibrahim and another reported in (1996) 8 SCC 372.

4.7 Learned advocate further submitted that the objection is also raised to the locus of the respondents No.1 to 3 to prefer any application under Order 21 Rule 97 stating that they are neither decree holders nor auction purchasers. The objection would also not be

tenable in view of the following submissions:

(1) After purchasing the property from the auction-purchaser, the respondents No.1 to 3 also acquired all the rights to pursue applications for removing obstruction that may be raised for execution of the decree. Order 21 Rule 16 of the CPC which provides application of execution petition by transferee of a decree.

(2) After purchasing the property from the auction-purchaser, the respondents No.1 to 3 stepped into the shoes of the auction-purchaser and thus the application made at their instance is maintainable.

(3) The respondents No.1 to 3 were impleaded as parties in the proceedings in the year 1992. The said order was never challenged by the appellant and now they cannot challenge the same on the ground that the same is an after thought. Also, the appellant is bound by estoppel and acquiescence.

(4) Further, when order dated 10.3.1998 was challenged before the Hon'ble High Court by way of Civil Revision Application No.526 of 1998, such objection was never canvassed or put forward for adjudication by the Hon'ble Court and the appellant ought not to have agreed to the order passed by the Hon'ble High Court in Civil Revision Application No.526 of 1998. Thus, since the appellant has not challenged the impleadment of the respondents No.1 to 3 ever in the past and more particularly when he had the opportunity of the same in Civil Revision Application No.526 of 1998, the objection cannot be entertained at this stage.

4.8 Learned advocate further submitted that the objection is raised to the effect that proceedings under Order 21 Rule 97 are independent proceedings and they are required to be tried as a suit and hence the said proceedings are required to be numbered as Misc.Civil Application.

4.9 He submitted that this objection is nothing but frivolous and appears to have been raised only for the purpose of raising it, without any legal basis for the same. He submitted that this objection is cannot be survived on following facts:

(1) This point was never urged before the trial court.

(2) The objection is merely technical in nature and at best a procedural defect. Since procedure is hand-maid of justice, the objection cannot be sustained.

(3) The application below Order 21 Rule 97 was tried as a suit and detailed inquiry was made by the trial court and only thereafter a thorough complete judgment was rendered.

4.10 Learned advocate for the respondents has relied upon the judgment of this Court in Second Appeal No.228 of 1991 decided on 20th August, 2002, in the case of Anish Rameshbhai Patel vs. Abbasbhai Mahmadali Vania on interpretation of Order 21 Rules 96 to 103 in this behalf.

5. I have considered the rival submissions in this behalf. I have considered Article 129 of the Limitation Act. I have also gone through the reasonings of the learned Judge in this behalf.

5.1 As regards limitation, the learned trial Judge has already given a finding that in this case the applicant had given application Exh.69 before the Court on 10.2.1995 and within 30 days from that day the present application has been filed on 28.2.1995 being Exh.69. In view of the same as per Article 129 of the Limitation Act the present application is filed within the prescribed period of limitation act. Over and above, the judgment of this Court in the case of Maneklal Nathalal Jingar (supra) also support the contention raised by the learned advocate for the respondents in which the Court has also held that it is the obstructor's complaint of an application under Order 21 Rule 97 taken into consideration resistance for the purpose of computing limitation under Article 129 of the Act so long as order below Ex.29 continued to remain in force were obstructed every day and in that view of the matter also the bar contained in under Article 129 of the Act is not applied in this behalf.

5.2 As regards jurisdiction, I have considered the submissions of respondents and he has also produced the judgment of the court below dated 5.8.2002 passed by the learned Jt.Civil Judge (J.D.), Petlad, in Civil Suit No.348/87 in which also the suit of Naginbhai has been

dismissed and injunction has also been vacated in this behalf. I am also told that the appeal has been filed but no interim order has been passed in this behalf.

5.3 In view of the same also the question of jurisdiction has no substance. The contention of the learned advocate for the respondent is also required to be accepted in view of the judgment of the Hon'ble Apex Court in the case of Kazi Akeel Ahmed Vs. Ibrahim and another reported in 1996(8) SCC 372 para 8 on page 374 which reads as under:

"para.8 We have given serious consideration to the facts of the present case and the submissions made by the learned counsel for the appellant. It is true that when an application under Order 21 Rule 97 of the Code is made, it contemplates an investigation into the claim made in the application, in accordance with the provisions contained in Rule 98 and the rules following thereafter. But in the special facts and circumstances of the present case, we see no reason to hold such an enquiry or investigation as the same would be a futile exercise in view of the fact that civil suit instituted by Respondent 2 Girraj making the same claim as has been made by him in his application under Order 21 Rule 97 has been dismissed by the civil court on 2.11.1995. A perusal of the said judgment goes to show that Respondent 2 Girraj was unable to produce any evidence, oral or documentary, to prove that he was holding the shop in question as a tenant in his own rights. These facts clearly go to show that the claim of Respondent 2 that he is a tenant is wholly fictitious and without any foundation and it was for this reason that the suit had been dismissed with costs to the tune of Rs.2000. Having regard to these facts and circumstances, we find absolutely no merit in the application of Respondent 2 resisting the execution of the decree validly passed by a competent Court of Law."

5.4 In view of the same the contention regarding jurisdiction has no substance. In view of the averments made by the learned advocate for the respondent, I am of the view that the respondents No.1 to 3 have already filed an application under Order 21 Rule 97 of CPC on the ground that they have subsequently purchased the property in 1990 in this behalf for which the appellant has not objected the locus of respondents No.1 to 3 earlier in

the Revision Application No.526/98 in this behalf also.

5.5 In my view the trial court has also considered the provisions of Order 21 Rule 97 of the CPC and as if the proceedings are independent the court has investigated all facts and circumstances of case and therefore also I have gone through the judgment of the trial court in this behalf. In my view the trial court has given a very cogent and convincing reasons and I do no see any reasons to interfere with the said judgment and decree of the trial court. Hence the judgment and decree passed by the trial court is confirmed. In view of the same, the First Appeal is dismissed with no order as to costs.

(K.M. Mehta, J.)

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